

Before the  
Federal Communications Commission  
Washington, D.C.

MAR 17 1997

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

Pursuant to Public Notice DA 97-385

CC Docket No. 96-115

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The Competition Policy Institute ("CPI")<sup>1</sup> submits these further comments in CC Docket No. 96-115 pursuant to Public Notice DA 97-385 dated February 20, 1997. In the Public Notice, the Common Carrier Bureau seeks further comment on a number of specific questions concerning the relationship between the rules for customer proprietary network information (CPNI) required by new Section 222 of the Communications Act of 1934 (the Act) and the non-discrimination obligations of telecommunications carriers under a variety of other provisions of the Act.

The Bureau has identified a number of critically important issues concerning the interplay between the CPNI rules and other provisions of the Act. Rather than respond to each question separately, CPI offers the Bureau and the Commission in these comments a general approach that will provide guidance for resolving these issues. We believe that this approach provides answers to many, if not all, of the specific questions raised in the Public Notice.

#### Customer Control is Paramount

As CPI discussed in its reply comments in this proceeding, control over a consumer's CPNI should rest with the consumer. (CPI Reply Comments, pp.3-4.) If the consumer indicates explicitly how his or her CPNI should be made available, that choice should prevail over the preferences of the carriers.

The principle that customers, not carriers, control the use and distribution of CPNI is tremendously important. As communications technologies and services proliferate, consumers face the possibility that information concerning their use of

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<sup>1</sup> CPI is an independent, non-profit organization that advocates state and federal policies to bring competition to energy and telecommunications markets in ways that benefit consumers.

these services may spread to carriers and other businesses with which the consumer has no relationship and no desire to establish a relationship. CPNI includes information concerning the number of telephone calls made, the places that are called, what type of service is provided, and the amount the consumer spends on communications services. Because this information is generated by the consumer, control over this information should rest with the consumer.

The principle of consumer control over CPNI is supported by a number of provisions of the Telecommunications Act of 1996 (Pub. Law No. 104-104) (the 1996 Act). Section 222(a) imposes a general duty on all carriers to protect the confidentiality of consumer information, a duty that did not exist prior to passage of the 1996 Act. That Congress imposed this duty on all carriers, not just incumbent carriers, demonstrates Congress' desire to enhance the privacy protections for consumers.

Congress' intention to give consumers control over their CPNI is also set forth in section 222(c)(2), as follows:

(2) DISCLOSURE ON REQUEST BY CUSTOMERS.-- A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(Emphasis added.) In other words, this provision establishes that carriers must comply with the intentions of the consumer. If a consumer states in writing his or her

desire to disclose CPNI to another carrier or a person, the carrier is required to carry out the consumer's wish, regardless of the preferences of the carrier holding the information.<sup>2</sup>

The "flip side of the coin" is also true. If a consumer expresses his or desire in writing not to disclose his or her CPNI, the carrier must comply with the customer's intention. The customer may choose to discriminate among carriers, allowing some carriers to have access to the information and not others. The customer may also choose not to permit disclosure to other employees or personnel of the carrier providing the service from which the information is derived. As long as the intention of the customer is set forth explicitly in writing, the carriers must follow the consumer's direction.<sup>3</sup>

#### Presumed Consumer Consent is Limited by the Act

In those cases where consumers have not expressed a clear intention, section 222 provides that disclosure shall be quite limited. Section 222(c)(1) states that, without customer approval, carriers may only use such CPNI for services from which

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<sup>2</sup>This provision does not state, as some of the questions in the Public Notice imply, that a telecommunications carrier shall "only" disclose CPNI upon affirmative written request. Subsection (c)(2) is not a limitation on when carriers may disclose CPNI, but a mandate that they must disclose CPNI if the customer submits a written request for its disclosure. See, Conference Report, p. 205 ("The conferees also agreed upon a provision that will require disclosure of CPNI by a telecommunications carrier upon affirmative written request by the customer, to any person designated by the customer.") Nevertheless, CPI believes that the Commission has the general authority to require that CPNI only be disclosed upon written request by the consumer under subsection (c)(1). See pp. 6-10 below and CPI Reply Comments, pp. 9-10.

<sup>3</sup>An exception to this general rule, of course, is if the CPNI is requested pursuant to a legally obtained warrant, or for other law enforcement or national security reasons.

the information is derived or services “necessary to, or used in, the provision of” such services. This limitation does not, as some have argued, allow the carriers to use the CPNI for any services used in conjunction with the initial service. For instance, a carrier may not use CPNI derived from local exchange service to market long distance service, without approval of the consumer. Long distance service is not necessary to “the provision of” local exchange service. For this reason, CPI supported the FCC’s tentative conclusions that the services for which CPNI approval would be presumed should be divided into local, long distance and commercial mobile radio services.

#### Balance of Three Consumer Interests

In reconciling section 222 with the competitive concerns raised in sections 272 and 274, the Commission must balance three different consumer interests. The Conference Report on the Telecommunications Act of 1996 mentions two of these concerns in stating that Section 222 “strives to balance both competitive and consumer privacy interests with respect to CPNI.” CPI respectfully suggests that, in addition to competitive concerns and consumer privacy concerns, consumer convenience is also a principal concern.

Each of these three concerns is reflected in the language of the Act. The consumer’s interest in protecting the privacy of his or her information is reflected in the title of Section 222 (“Privacy of Customer Information”), the general duty of carriers to protect the confidentiality of consumer information in Section 222(a), and subsection (c)(1). Consumers’ interest in choosing service from a variety of

competitors can be seen again in subsection (a) (which protects the confidentiality of carriers' proprietary information), subsection (c)(3) (which requires nondiscriminatory use of aggregate information), and sections 272 and 274 (governing the obligations of certain telephone companies to make information available to their competitors).

Third, consumers' interest in having his or her service provided in a convenient manner is reflected in subsection (c)(1), which allows carriers to use CPNI in its provision of the service from which the information was derived and services necessary to, or used in, the provision of such service.

CPI believes that it is the tension among these three consumer interests that underlies many of the questions raised by the Bureau in the Public Notice. CPI will offer some observations on this tension as a guide to answering the specific questions raised in the Public Notice.

First, it should be clear to the Commission that no one of these consumer interests should predominate to the exclusion of the others. For instance, to the extent that incumbent local exchange carriers argue that they should be given the unfettered right to use CPNI for any service that they wish to provide to the consumer, and to pass the information on to their subsidiaries, to serve the goal of providing maximum consumer convenience, that view must be rejected as inconsistent with the goals of competitive neutrality and protection of consumers' privacy interests.

Similarly, allowing all competitors automatically to have access to all CPNI possessed by the incumbent telephone company in order to serve the goal of competitive

neutrality would fail to recognize consumers' privacy interests. Finally, barring the release of any CPNI to any entity without the express written consent of the consumer would harm the interests of consumers in receiving service conveniently and might harm the development of competition.

Rules Governing the RBOCs' use of CPNI Must Balance all Three Consumer Interests.

Keeping this balance in mind, we turn now to the general issue of what rules should govern the treatment of CPNI by the Regional Bell Operating Companies (RBOCs) in relation to their affiliates under Sections 272 and 274. The initial and important point is that the services provided under Section 272 and 274 (manufacturing, certain interLATA services, certain information services, and electronic publishing) are not "necessary to, or used in, the provision of" local exchange service. Therefore, section 222(c)(1) requires that an RBOC may only disclose a consumer's CPNI to any of its 272 and 274 affiliates if it receives "the approval of the customer".

Allowing the RBOCs to disclose this information to their affiliates without securing consumer consent would give RBOC affiliates a competitive advantage over other competitors (causing harm to the interest in competition) and would violate the consumer's expectation of privacy (causing harm to consumers' privacy interest). Since the RBOC affiliates provide a service different from local exchange service, allowing an RBOC local exchange service provider to pass on CPNI to any of its affiliates would not provide any significant consumer convenience. Therefore, the

Commission must adopt explicit rules to govern how the RBOC obtains customer approval and the form of that approval (oral or written) before disclosing this information.

**RBOCs Should be Required to Use an FCC-Prescribed Form to Solicit CPNI**

Section 222(c)(1) states that carriers must obtain the approval of the consumer but does not specify the form of that consent. In the absence of direction from Congress, the FCC has the discretion to require whatever form of consent would satisfy the goals of the 1996 Act and serve the three consumer interests discussed above.

In CPI's reply comments, CPI suggested that written approval should be required in order to prevent consumer fraud and to protect consumers' privacy interests. The need for nondiscriminatory treatment of other service providers is an additional reason why such consent must be in writing. Only if the consumer gives his or her consent in writing can it be clear that the goal of competitive neutrality has been served.

The solicitation of CPNI disclosure by the RBOC presents unique problems. RBOCs are about to enter several new lines of business while they continue to possess market power over local exchange services. Because of the particularly important consequences to competition and consumer privacy interests in the future, additional protections should govern the use and disclosure of CPNI by the RBOCs at this time.

CPI suggests that the Commission should adopt the following approach: to the

extent that the RBOC providing local exchange service solicits the customer's approval to disclose his or her CPNI, the RBOC should be required to obtain the consent of the consumer in writing, using a form prescribed by the Commission. The form provided by the RBOC should clearly inform the consumer of three classes of rights: his or her rights not to disclose CPNI at all, his or her rights to permit disclosure to all other service providers, and his or her rights to choose to disclose CPNI to some carriers and not others on a case by case basis to each service provider individually. After informing the consumer of these three rights, the form provided by the RBOC should provide the consumer with a single choice -- either to allow the RBOC to disclose CPNI to all telecommunications providers or to take no action at all. If the consumer takes no action, such as by not returning the form to the RBOC, the consumer will retain the right to disclose CPNI on a case-by-case basis to each carrier individually.

In no case should the form give the consumer the choice of providing CPNI to the RBOC affiliate alone. This option would give the RBOC affiliate a competitive advantage over any other service provider. Nor should the form give consumers the option of barring disclosure to individual carriers in the future. Consumers should always be able to give their consent at a later point in time to an individual carrier.

#### Other ILECs Should Also Use an FCC -Prescribed Form

Further, CPI believes that the Commission should extend the same process outlined above to certain other incumbent local exchange carriers (ILECs). All incumbent local exchange companies have the same incentives as the RBOCs to favor

their affiliates. This incentive to discriminate in favor of an affiliate is especially dangerous in the case of larger ILECs.

CPI urges the Commission to apply the process outlined above to ILECs based on the three categories established in the 1996 Act.<sup>4</sup> The largest ILECs should be required to adopt the procedures set forth above. The ILECs with less than 2 percent of the nation's access lines should be required to follow the above procedures unless they obtain a waiver of these rules by demonstrating that compliance with the FCC-prescribed form would be unnecessarily burdensome. Finally, rural ILECs should not be required to use the FCC-prescribed form unless an individual carrier can demonstrate to the Commission why the ILEC should be required to use such a form.<sup>5</sup>

**ILEC Affiliates and Competitive Carriers Must Obtain Consumer Consent in Writing, but Need Not Use an FCC-Prescribed Form.**

CPI suggests a different approach if the affiliates of an RBOC or an ILEC, or any carrier other than an ILEC, solicits the use or disclosure of CPNI. ILEC affiliates, and competitors to those affiliates, will not have market power over the services they offer. While consumers' privacy interests must still be protected, it is not necessary to

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<sup>4</sup>While Sections 272 and 274 of the Act apply specifically to the RBOCs, the Commission has general authority under the Act to apply these CPNI protections to other ILECs, as it has done in its Computer III rules. See, Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, and subsequent decisions.

<sup>5</sup>These three categories should be used only to determine whether the particular ILEC is required to use an FCC-prescribed form for disclosing CPNI. All carriers, including all ILECs, must be subject to the rule that requires them to obtain the written consent of the consumer prior to releasing the consumer's CPNI.

require these companies to behave in a competitively neutral manner.

As a result, to the extent that an RBOC affiliate solicits a customer's approval to disclose his or her CPNI, the consumer's consent should also be in writing, and the affiliate soliciting the CPNI approval must disclose the consumer's right not to disclose his or her CPNI at all. In this case, however, the affiliate need not use a specific form prescribed by the Commission and need not provide the customer with notice of the opportunity to disclose his or her CPNI to other carriers. Similarly, competitors to the RBOC affiliate should be bound by the same requirements -- they must receive the CPNI disclosure approval in writing, and must disclose to the consumer his or her right not to disclose CPNI at all, but they need not follow the same nondiscrimination requirements as those that apply to the RBOC local exchange provider.

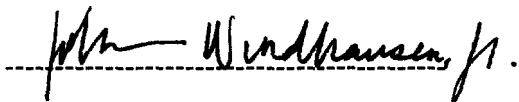
Oral Approval is Acceptable When the Consumer Initiates the Transaction.

The above procedures requiring a written authorization should apply when the company initiates the transaction. When the consumer initiates the transaction, however, the consumer should be permitted to give his or her oral consent for the disclosure of his or her CPNI. Such consent should be valid only for the purpose of completing the particular transaction initiated by the consumer. The carrier should not be permitted to use that oral consent to release the CPNI to other carriers or to use that CPNI for other services not requested by the consumer. Allowing oral consent in these cases will serve the consumer's interest in obtaining service conveniently.

Conclusion

CPI believes that the approach outlined above balances the consumer's interest in privacy, competitive offerings, and convenience. CPI also believes that this approach provides answers to many of the questions raised in the Public Notice. CPI urges the Commission to adopt rules recognizing all three consumer interests.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John Windhausen, Jr.", is written over a horizontal dashed line.

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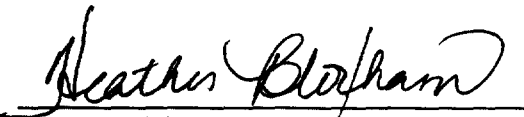
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